

SEP 21 1983

ALEXANDER L. STEVAS,  
CLERK

No. 83-246

IN THE  
**SUPREME COURT**  
OF THE  
UNITED STATES

**OCTOBER TERM, 1983**

DAVID F. MACKEY,

*Petitioner,*

vs.

ROBERT V. GRAHAM, State Auditor, and  
THE STATE OF WASHINGTON,

*Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT  
OF CERTIORARI TO THE SUPREME COURT OF  
THE STATE OF WASHINGTON

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## QUESTIONS PRESENTED

Petitioner was employed as a state examiner by the Washington State Auditor's Office. He resigned his employment after being informed that he would be discharged if he did not comply with a regulation prohibiting audit examiners from engaging in an outside practice of auditing, accounting, tax work, or consulting.

### ISSUE NO. I

May a state officer, acting under authorization of state statute, prohibit employees from engaging in types of outside employment which the officer finds would constitute an actual or apparent conflict of interest?

### ISSUE NO. II

May a petitioner base a petition for a writ of certiorari on factual allegations not in the record of the state court proceeding where such noninclusion was caused by the omissions of the petitioner?

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IN THE  
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DAVID F. MACKEY,

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THE STATE OF WASHINGTON,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT  
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THE STATE OF WASHINGTON

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STATEMENT OF THE CASE

Respondent Robert V. Graham is the Washington State Auditor, an elected officer whose duties are prescribed by state constitutional and statutory provisions which relate generally to the examination and audit of public accounts. The State Auditor is concerned that his office not only be independent and fair in its examinations of other agencies but also that it maintain an appearance of fairness. To achieve that purpose the Auditor has restricted outside private employment by his employees and has not knowingly permitted state examiners to engage in the outside practice of accounting or auditing.

As early as 1974, the State Auditor issued written

policies prohibiting his employees from engaging in outside employment incompatible with their public positions. In 1978, the State Auditor adopted and issued a revised handbook containing a regulation (Section 500.11.3.C, reproduced in the Petition at p. 2) specifically prohibiting employees from engaging in "\* \* \* outside practice of auditing, accounting, tax work or consulting."

Petitioner David F. Mackey was employed by the State Auditor as a state examiner in 1974. During or prior to 1977, when Petitioner Mackey became a certified public accountant, the petitioner began to engage in the private business of accounting. He has continued practice as a certified public accountant since that time.

The State Auditor published the 1978 office manual prohibiting certain forms of outside employment. At that time he was first informed of Petitioner Mackey's outside private practice of accounting. The State Auditor met with Mr. Mackey and advised him that outside practice was prohibited. Mr. Mackey nevertheless continued to engage in his private accounting activity. On October 10, 1979, State Auditor Graham wrote Petitioner Mackey a letter demanding that he comply with the rule. The petitioner responded by filing an action in the Superior Court for Thurston County, Washington, challenging the validity of the State Auditor's regulation on a number of statutory and constitutional grounds.

After the superior court entered summary judgment in favor of the respondents, petitioner appealed the case to the Washington State Court of Appeals. Subsequently, the matter was transferred to the Washington State Supreme Court for review and decision.

On May 19, 1983, the Washington State Supreme Court issued an opinion (withdrawing an earlier opinion dismissing the case for mootness) unanimously affirming the decision of the trial court. *Mackey v. Graham*, 99 Wn.2d 572, \_\_\_ P.2d \_\_\_ (May 19, 1983). The state supreme court held that the auditor was acting within statutory authority in promulgating the regulation (99

Wn.2d at 574-575) and that the regulations did not deprive state examiners of property without due process of law (99 Wn.2d at 575-576). Finally, the state supreme court noted that petitioner failed to include in the record any factual evidence to support a promissory estoppel contention.

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### SUMMARY OF ARGUMENT

The State Auditor's regulation 500.11.3.C is a rational exercise of the State Auditor's responsibility to manage the work of his office, to promote public confidence in government. The regulation protects the reputation of his office and his employees by preventing outside accounting employment which would be an actual or apparent conflict with public employment.

There is no case law to suggest that the Fifth and Fourteenth Amendments to the United State Constitution prohibit states from requiring, as a condition of continued public employment, that public employees refrain from outside employment activities which the state finds inconsistent with the employee's public employment responsibilities.

To the extent the petitioner is basing his assertions upon factual matters not before the Supreme Court of the State of Washington, this Court should disregard both the factual assertions and any legal arguments based upon them.

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### ARGUMENT

#### **I. A State Officer May Restrict His Employees From Engaging In Outside Employment Which The Officer Finds Would Present An Actual Or Potential Conflict With Public Employment.**

The argument of the petitioner (Petition, pp. 4-6) reflects the following simple but defective line of reasoning. The two faulty assumptions are:

1. Petitioner has a property right to his state job

protected by the United States Constitution; and

2. Petitioner has a property right to his outside employment protected by the United States Constitution.

From those assumptions the petitioner concludes: Therefore, the state may not require the petitioner to choose between his public and his private employment without unconstitutionally depriving the petitioner of his property without due process of law.

Neither of the first two propositions is true in the sense petitioner suggests. Even more importantly, the third proposition does not follow from the first two.

Petitioner's contention that he has a constitutionally protected property right in his state job is based entirely upon a state civil service statute, Washington Revised Code Section 41.06.040 (1972) (Petition, p. 4). If petitioner's claim to property right in his state job depends entirely upon state law, the petitioner's argument fails, because the State Supreme Court has already construed that state law as not providing a right to public employment that prevents the State Auditor from conditioning the petitioner's continued public employment on the ceasing of outside accounting practice. *Mackey v. Graham*, 99 Wn.2d 572, 574, 575.

Even if the petitioner had cited federal constitutional or statutory provisions for the proposition a protected property right in his public employment, it would nevertheless follow that, as petitioner concedes (Petition, p. 5) that the state has a legitimate interest in regulating conflicts of interest among its employees and can discipline or discharge employees who violate reasonable state regulations aimed at preventing conflicts of interests.

The Fourteenth Amendment to the United States Constitution protects persons from deprivation of life, liberty, or property "\* \* \* without due process of law. \* \* \*" As a Washington state civil service employee, the petitioner would have been entitled, upon discharge or other discipline, to an administrative hearing and a subsequent judicial review. Washington Revised Code, Section 41.06.170 and Washington Revised Code, Chapter



41.64. However, this petitioner resigned and made no attempt to use the state administrative process which was available to him.

The petitioner has failed to show any constitutionally protected property right in his state job which has been violated by the actions of the state in this matter. Nor has the state deprived petitioner of any legitimate property interest he might have in his private employment or in his right to follow his chosen profession.

None of the cases cited in the petition supports the proposition that a public employee has a constitutionally protected property right to hold a private job along with public employment. The early cases of *Trux v. Raich*, 239 U.S. 33 (1915) and *Dent v. West Virginia*, 129 U.S. 114 (1889) stand for the proposition that the federal constitution protects a person's right to employment in the sense of right to earn a livelihood. In this case, the most the state has done is to ask Petitioner Mackey to choose between public and private employment. The state has not attempted to deny the petitioner employment altogether. At this moment, the petitioner is practicing his chosen profession in the State of Washington, and the state has never questioned his right to do so.

The petitioner has not contended at any point in this case that both public employment and outside private employment is necessary to support himself or to earn an adequate living. Thus, it is clear that this case simply is not a situation in which a state seeks to deny any person his right to be employed or follow his chosen profession.

The other two cases cited in the petition, *Slochower v. Board of Education*, 350 U.S. 551 (1956) and *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) are also distinguishable. In the *Slochower* case, this Court struck down a New York City charter provision which provided for the automatic discharge of any city employee utilizing the privilege against self incrimination to avoid answering a question related to his official conduct before a legislative committee. This Court carefully based the decision not upon the existence of an absolute right to

public employment but rather on the arbitrary and unreasonable nature of an automatic discharge provision. This Court observed:

"This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violated due process of law."

350, U.S. 559.

The *Schware* case involved a situation in which the State of New Mexico sought to deny admission to the bar of the state because of past activities and connection to the communist party. Involved was the extent to which the state could regulate a profession. That is clearly distinguishable from the present case, in which the state has not questioned the petitioner's right to follow his chosen profession, merely his right to continue in potentially conflicting state employment at the same time.

The United States Court of Appeals in *Gosney v. Sonora Independent School District*, 603 F.2d 522 (5th Cir. 1979) discussed this issue at some length. There a school district had discharged two employees for failure to comply with a school district policy that prohibited school district employees from engaging in any other business or profession. The Gosneys claimed that the school district policy violated their substantive due process under the Fourteenth Amendment. They further contended that the regulation bore no rational relation to any legitimate state interest, and that they had been denied procedural due process. Finally, they claimed a violation of their right to equal protection because of a nonuniform enforcement of the board's policy.

The district court held for the school district on all major points. The Court of Appeals held that the school

district policy prohibiting all outside employment did not violate the Fourteenth Amendment, and the policy constituted a rational and a proper means for assuring a well functioning school system. *Gosney supra* at 524-526. The Court of Appeals did reverse the district court on equal protection grounds, because the record showed that the school district's policy had not been uniformly enforced.

The regulation challenged in this case is not a blanket prohibition against outside employment as in *Gosney*. The Court stated in *Gosney*:

"We emphasize that our decision in the present case does not prevent the school district from uniformly applying its present rule in the future. Nor does it prevent the district from adopting a more flexible rule—one perhaps more suited to its particular circumstances as a rural community where many teachers apparently live on working ranches—that in clear terms permits a certain amount or kind of outside employment and prohibits all employment not falling within the clearly defined acceptable categories. \* \* \*

603 F.2d at 527-528.

The regulation here complained of by Petitioner Mackey is clear and reasonably related to the promotion of proper public purposes. The State Auditor is attempting to prohibit those forms of outside employment which he believes will create actual or apparent conflicts of interest with public employment, while allowing other forms of outside employment which would not present these problems.

The petitioner complains that the State Auditor's classification is unreasonable, and insists that he, rather than his employer, should be permitted to decide which forms of outside employment would constitute conflicts of interest. As this court observed in *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), legislative and administrative decisions are not subject to Fourteenth

Amendment attack merely because they are not perfect. As the Court stated in *Williamson*,

“\* \* \* but the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”

348 U.S. at 487-488.

The State Auditor's regulation rests on a reasonable and compelling basis—the prevention of actual or potential conflicts of interests with the fiduciary responsibilities of state examiners as public trustees. The regulation by the state examiner is rationally related to that purpose. It does not deprive the petitioner or his colleagues of their livelihood but does require them to choose which of two masters they will serve.

## **II. The Petitioner Is Not Entitled To Reassert Factual Allegations In This Court Which Were Not Before The State Supreme Court.**

The petitioner makes factual allegations (see Petition at p. 3) based on assertions contained in petitioner's affidavit printed in the petition for writ of certiorari as Appendix A. The petitioner did not include that affidavit in the Clerk's Papers transmitted by the state superior court. The affidavit therefore is not a part of the record on appeal.<sup>1</sup>

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<sup>1</sup>Washington rules of appellate procedure make it the responsibility of the party seeking review of the trial court decision to designate those clerk's papers and exhibits the party wants the trial court clerk to transmit to the appellate court. Rules of Appellate Procedure 9.6 (printed herein as Appendix A).

The state supreme court made specific mention of petitioner's failure to include the challenged affidavit in the record on appeal:

“Finally, there are questions about the adequacy of the factual record. Although appellant presented a promissory estoppel argument, the record does not indicate that he satisfied his burden as to

Such factual allegations should be disregarded.

A writ of certiorari is by its very nature a review of the record of a state court of last resort. This is implicitly recognized in Supreme Court Rules 17 and 19 (particularly Rules 19.1 and 19.2).<sup>2</sup>

Accordingly, factual and legal assertions based on matters not in the record must be disregarded.

The improper assertion of factual matters not within the record is the partial basis for the argument in the Petition (Petition, pp. 6 and 7) that the petitioner herein is somehow being denied the equal protection of the law. It should be made clear that the petitioner has not made the contention factually, nor is there any evidence in the record to suggest, that other state examiners engaging in the outside practice of accounting or auditing are or have been treated differently from the petitioner. Indeed, the record indicates that the State Auditor has never knowingly permitted any of his employees to engage in outside accounting practice.

On page 7 of the Petition, reference is made to the statement of facts as a source for the information that

“\* \* \* state examiners are not prohibited from running a home construction business, a business that is regulated in part by the State Auditor’s Office.”

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the facts necessary to establish the elements of that theory. *State v. Charlton*, 71 Wn.2d 748, 751, 430 P.2d 977 (1967). The record is not sufficient, in part, because the State submitted several affidavits denying the existence of any facts supporting the estoppel theory, yet counsel for appellant did not submit any affidavits either countering those denials or offering factual allegations in support of the theory. Similarly, appellant opposed the summary judgment motion, but his attorney submitted no affidavits to demonstrate a genuine issue of material fact. A party seeking to avoid summary judgment cannot simply rest upon the allegations of his pleadings, he must affirmatively present the factual evidence upon which he relies.” [Citations omitted.]

99 Wn.2d at 576.

<sup>2</sup>The petitioner has apparently not requested the clerk of the State Supreme Court to certify the record of this case, or any part of it, to the United States Supreme Court in accordance with Supreme Court Rule 19.1.

That factual assertion does not appear in the record of this case and should be disregarded. (In fact, the home construction business in the State of Washington is not by any stretch of the imagination regulated by the State Auditor's Office. Article 3, Section 20 of the Washington State Constitution and Chapter 43.09.050, Washington Revised Code, which delineates the duties of the State Auditor, do not assign to his office any functions remotely relating to the regulation of the home construction business.)

The record of this case contains nothing to justify the petitioner's assertion that he has been denied equal protection of the law under the Fifth and Fourteenth Amendments of the United States Constitution.

Petitioner's equal protection argument simply consists of a reworking of his due process argument, salted with the improper and irrelevant factual assertions. These assertions should be disregarded. The petitioner did not even allege any equal protection violation in the state courts.

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## CONCLUSION

For the reasons stated above the respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

**KENNETH O. EIKENBERRY**

*Attorney General*  
State of Washington

**EDWARD B. MACKIE**

*Chief Deputy Attorney General*  
Counsel of Record

**JAMES K. PHARRIS**

*Assistant Attorney General*

*Attorneys for Respondents*  
Robert V. Graham and  
State of Washington

## APPENDIX A

### Rules of Appellate Procedure 9.6

**Rule 9.6 Designation of clerk's papers and exhibits.** The party seeking review should, within 30 days after review is accepted, serve on all other parties and file a designation of those clerk's papers and exhibits the party wants the trial court clerk to transmit to the appellate court. Any other party may in the same manner designate additional clerk's papers or exhibits for transmittal to the appellate court. Each party is encouraged to designate only clerk's papers and exhibits needed to review the issues presented to the appellate court.

## APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON IN AND FOR THE COUNTY OF  
THURSTON

NO. 80 2 00008 7  
PRAECIPE

DAVID F. MACKEY,

*Plaintiff,*

vs.

BURR B. ELLIOT, JR.,

*Intervenor,*

vs.

ROBERT V. GRAHAM, State Auditor: and the  
STATE OF WASHINGTON,

*Defendants.*

To: Clerk of the above-entitled Court.

Pursuant to RAP 9.6 and 9.7, you are hereby respectfully requested to make copies of the following described documents in this action; assemble the copies

and number each page in chronological order of filing; prepare a cover sheet for the documents entitled "Clerk's Papers"; prepare an alphabetical index for the documents; mail a copy of the index to the undersigned attorney at his address listed below, and to Robert F. Hauth, Senior Assistant Attorney General, Temple of Justice, Olympia, Washington, 98504; and transmit the assembled Clerk's Papers to the Court of Appeals, Division II, Tacoma Office Mall, Tacoma, Washington, 98409, in reference to appeals case number 05217-2.

**DOCUMENTS TO BE TRANSMITTED TO THE COURT OF APPEALS:**

1. Notice of Appeal, dated December 12, 1980, signed by Michael D. Barckley, for Herbert H. Fuller, Attorney for Plaintiff.

2. Order Granting Summary Judgment in Favor of Defendants, signed by the Honorable Frank E. Baker on November 14, 1980.

3. Motion for Reconsideration and Stay, signed by Herbert H. Fuller, Attorney for Plaintiff on October 1, 1980.

4. Defendants' Motion for Summary Judgment, signed by Robert F. Hauth, Senior Assistant Attorney General, on June 6, 1980.

5. Defendants Answer, Affirmative Defenses and Counterclaim, signed by Robert F. Hauth, Senior Assistant Attorney General on February 8, 1980.

6. Summons and Complaint, the Summons signed by Herbert H. Fuller, Attorney for Plaintiff, on November 20, 1979; and the Complaint verified by David F. Mackey, plaintiff, on October 29, 1979.

DATED this 25 day of March, 1981.

/s/ \_\_\_\_\_  
HERBERT H. FULLER of  
FULLER, BARCKLEY & MORGAN  
Attorneys for Plaintiff



STATE OF WASHINGTON

)

) ss.

COUNTY OF THURSTON

)

The undersigned, being first duly sworn, on oath states: That affiant is a citizen of the United States and over the age of twenty-one years. That on this day affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of defendants, containing a copy of the document to which this affidavit is attached.

/s/ \_\_\_\_\_

Subscribed and sworn to before me this 25th day of March 1981.

/s/ \_\_\_\_\_

Notary Public in and for the State of Washington, Residing at Olympia

### APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON IN AND FOR THE COUNTY OF  
THURSTON

NO. 80 2 00008 7  
SUPPLEMENTAL PRAECIPE

DAVID F. MACKEY,

*Appellants,*

vs.

ROBERT V. GRAHAM, State Auditor: and the  
STATE OF WASHINGTON,

*Respondents.*

To: Clerk of the above-entitled Court.

Pursuant to RAP 9.6 and 9.7, you are hereby

respectfully requested to make copies of the following described documents in this action; assemble the copies and number each page in chronological order of filing; prepare a cover sheet for the documents entitled "Clerk's Papers"; prepare an alphabetical index for the documents; mail a copy of the index to the undersigned attorney at his address listed below, and to Herbert H. Fuller, Fuller, Barckley & Morgan, 204 Custer Way, Olympia, Washington 98501; and transmit the assembled Clerk's Papers to the Court of Appeals, Division II, Tacoma Office Mall, Tacoma, Washington, 98409, in reference to appeals case number 05217-2.

DOCUMENTS TO BE TRANSMITTED TO THE COURT OF APPEALS:

1. Affidavit of Robert V. Graham and exhibits attached thereto;
2. Affidavit of Richard L. Husk;
3. Affidavit of Galen Jacobsen;
4. Affidavit of James Curnutt.

DATED this 23rd day of April, 1981

KENNETH O. EIKENBERRY  
*Attorney General*

ROBERT F. HAUTH  
*Senior Assistant  
Attorney General*

*Attorneys for Respondents*

## APPENDIX D

05217-2  
80 2 8 7

DAVID F. MACKEY,

*Plaintiff,*

v

ROBERT V. GRAHAM, State Auditor and  
THE STATE OF WASHINGTON,

*Defendants.*

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80 2 8 7

DAVID F. MACKEY,

*Plaintiff,*

v

ROBERT V. GRAHAM, State Auditor and  
THE STATE OF WASHINGTON,

*Defendants.*

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## APPENDIX F

Wash. St. Const., Article III, § 20

**§ 20 State auditor, duties and salary.** The auditor shall be auditor of public accounts, and shall have such powers and perform such duties in connection therewith as may be prescribed by law. He shall receive an annual salary of two thousand dollars, which may be increased by the legislature, but shall never exceed three thousand dollars per annum.

## APPENDIX G

Wash. Rev. Code § 43.09.050

**43.09.050 General duties of auditor.** The auditor shall:

(1) Except as otherwise specifically provided by law, audit the accounts of all collectors of the revenue and other holders of public money required by law to pay the same into the treasury;

(2) In his discretion, inspect the books of any person charged with the receipt, safekeeping, and disbursement of public moneys;

(3) Inform the attorney general in writing of the necessity for him to direct prosecutions in the name of the

state for all official delinquencies in relation to the assessment, collection, and payment of the revenue, against all persons who, by any means, become possessed of public money or property, and fail to pay over or deliver the same, and against all debtors of the state;

(4) Give information in writing to the legislature, whenever required, upon any subject relating to the financial affairs of the state, or touching any duties of his office;

(5) Report to the director of financial management in writing the names of all persons who have received any moneys belonging to the state, and have not accounted therefor;

(6) Authenticate with his official seal papers issued from his office;

(7) Make his official report annually on or before the 31st of December.